IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOAN TAYLOR **Plaintiff,**	
	CIVIL ACTION NO. 02-6558
v.	
KIM NELSON ET AL. **Defendants.**	

MEMORANDUM AND ORDER

Tucker, J. **January 31, 2006**

Presently before the Court are (1) Plaintiff Joan Taylor's ("Ms. Taylor") Motion for Partial Summary Judgment Against Vintage Mortgage Corporation ("Vintage") (Doc. 70) and Vintage's Response thereto (Doc. 87); (2) Ms. Taylor's Motion for Partial Summary Judgment Against Defendants Mortgage Electronic Registration System, Resources Bancshares Mortgage Group and Meritage Mortgage Company (collectively "Meritage") (Doc. 75) and Meritage's Response thereto (Doc. 88); (3) Defendant Vintage's Motion for Summary Judgment (Doc. 70) and Ms. Taylor's Affidavit and Response thereto (Docs. 99, 100); (4) Meritage's Motion for Summary Judgment (Doc. 73) and Ms. Taylor's Affidavit in Response thereto (Doc. 99); (5) Defendant United One Resources' ("United One") Motion for Summary Judgment (Doc. 60) and Ms. Taylor's Response thereto (Docs. 89, 90, 91, 92, 99); and (6) Defendant Richard S. Blum's ("Blum") Motion for Summary Judgment (Doc. 76) and Ms. Taylor's Response thereto (Docs. 95, 96, 97, 99). For the reasons set forth below, upon consideration of the Cross-Motions and Responses thereto, this Court will deny Ms. Taylor's Motions; grant the Motions of Vintage, and United One; and grant in part and deny in part the Motions of Meritage and Blum.

I. BACKGROUND

From the evidence of record, taken in a light most favorable to the Plaintiff, the pertinent facts are as follows. Plaintiff, Ms. Joan Taylor, is an unsophisticated, largely uneducated, low income, first-time home buyer. Ms. Taylor sought to purchase a home through the assistance of a program, sponsored by the City of Philadelphia, designed to help first-time home buyers. Instead, she became subject to a predatory real estate transaction that left her homeless and in financial ruin.

In August 2000, Ms. Taylor contacted Acorn Housing Corporation ("AHC") for assistance in purchasing a home. Gloria Stancil, an AHC housing counselor, referred Defendant Kim Nelson ("Nelson") to Ms. Taylor. Nelson showed Ms. Taylor a house that he said he had for sale at 2049 Gerritt Street, Philadelphia ("the property"), then discussed financing options with Ms. Taylor, who told Nelson that she wanted a fixed-rate, thirty-year mortgage.

Nelson and Ms. Taylor entered into an agreement of sale for the property on May 1, 2001, and Nelson told Ms. Taylor that he would arrange financing for her to purchase the property. Prior to entering the agreement of sale, on or about April 26, 2001, Nelson contacted Peter Howatt ("Mr. Howatt"), a representative of Vintage, to arrange financing for Ms. Taylor to purchase the property. Vintage generated a Uniform Residential Loan Application ("URLA") reflecting the terms of the credit Ms. Taylor was requesting: a single, fixed-rate, purchase money mortgage in the amount of $40,000.00 at 10.75%, fully-amortized over thirty years. Ms. Taylor signed the application, and Nelson entered the date on the application on or about the date that Ms. Taylor signed it.

Nelson provided the signed application, along with other supporting documentation to Howatt, who sent the entire loan package, including the application, disclosures, income

documentation, credit report and appraisal, via overnight mail on or about June 11, 2001, to Meritage. When Meritage received the application on June 12, 2001, it did not at the time originate fixed-rate, first mortgage loans in Pennsylvania for less than $50,000.00, and did not extend credit to Ms. Taylor on the terms requested in the URLA.

On July 3, 2001, Ms. Taylor attended settlement on her purchase of the property. The sale transaction was completed with two mortgage loans originated by Meritage: a loan in the amount of $25,000 with an adjustable interest rate, and another in the amount of $10,000.00 with an interest rate of 13.75%, and a balloon payment at the end of fifteen years. Ms. Taylor states that she was never able to move into the home because it was uninhabitable, and that as a result, she and her daughter became homeless.

Ms. Taylor filed this case in Common Pleas Court in July 2002 against Defendants Nelson, Vintage, Meritage, Blum, United One, Wilshire Credit Corporation,[1] and Jamilah Presley.[2] The action was removed to this Court in August 2002, where Ms. Taylor alleges that she was victimized by the Defendants in a predatory lending/predatory sale of what was to be her first home, and is seeking affirmative damages, punitive damages, rescission, declaratory relief, attorneys fees, costs, and other statutory relief pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1640 and Regulation Z, 12 C.F.R. § 226; Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 and Regulation B, 12 C.F.R. § 202; the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 PA. CONS. STAT. § 201-1 et seq.; the

[1]Ms. Taylor has settled her claims against Wilshire Credit.

[2]Defendant Jamilah Presley ("Presley") has never appeared in this litigation, and has not been reachable by mail, as all her correspondence from the Clerk's Office has been returned as undeliverable. Nelson remains unrepresented by counsel, and has not filed a dispositive motion. Ms. Taylor has also not filed any dispositive motions against Nelson or Presley. The remaining parties' cross-motions are discussed herein.

Homeownership and Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639 et seq.; the Fair Debt Collection Practice Act ("FDCPA"); the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601-2605; and common law fraud.[3]

Ms. Taylor alleges in her Complaint that she was defrauded by Nelson's knowing and intentional misrepresentations into paying an unconscionable price for a house that was uninhabitable, and that she was lured into two loan transactions, which taken together resulted in excessive or illegal fees, high interest, and onerous terms such as variable interest, a balloon payment, and illegal prepayment penalties that she did not want or bargain. As an additional condition of the credit transaction, Ms. Taylor was locked into a home improvement loan that attempted to circumvent the protective provisions of the Pennsylvania Home Improvement Finance Act, the provisions of Act 6 of 1974, and the rescission provisions of TILA.

Additionally, Ms. Taylor alleges that as a result of the transaction, she relinquished an affordable apartment and subsequently was made homeless because the property she purchased was uninhabitable. She further alleges that even after she rescinded the transactions, Meritage and Wilshire, either directly or through their agents, refused to comply with applicable law and continued to insist upon payment of debts that were no longer due. Specifically, Ms. Taylor's claims are set forth as: Count I asserting rescission under the UTPCPL against Nelson, Presley, Meritage, and Wilshire; Count II alleging UTPCPL damages against Nelson, Presley, Meritage, and Wilshire; Count III alleging common law fraud against Nelson, Presley, Meritage, Wilshire,

[3]Ms. Taylor alleges liability on the part of the Defendants acting in the following capacities: (1) Nelson, acting individually and as an agent for Meritage and Presley; and as creditor and arranger of credit; (2) Vintage as creditor and arranger of credit, acting for itself and as an agent for Nelson, and Meritage; (3) Meritage, as creditor and arranger of credit, debt collector, and holder of the two mortgages created by the transactions alleged; (4) Blum, acting as an agent of Nelson and providing a fraudulent appraisal of the sale property; (5) United One, acting for itself and as an agent for Meritage and Nelson; (6) Wilshire Credit Corp, individually and as an agent for Meritage, and as a debt collector; and (7) Presley as the seller of the property.

Vintage, and Blum; Count IV alleging ECOA violations against Meritage, Nelson, and Vintage; Count V alleging RESPA violations against Meritage, Vintage, and Nelson; Count VI alleging HOEPA violations against Meritage, Nelson, Presley, and Wilshire; Count VII alleging TILA violations against Meritage, Nelson, Presley, and Wilshire; and Count VIII alleging FDCPA and RESPA violations against Wilshire and Meritage.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to supportthe non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the

non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against opponent, even if the quality of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

III. DISCUSSION

A. Ms. Taylor's Motion for Partial Summary Judgment Against Vintage

Ms. Taylor states in her Complaint that Vintage, as a creditor participating in financing Ms. Taylor's home purchase, was obligated as a matter of law to provide her with written notice of adverse action as required by ECOA. According to Ms. Taylor, Nelson represented himself to Vintage to be acting on her behalf and Vintage treated Nelson as her agent. Specifically, Ms. Taylor states in her instant motion that Vintage's representative Mr. Howatt communicated exclusively and verbally with Nelson in processing Ms. Taylor's three written credit applications and, in doing so, failed to provide her with a written notice of adverse action containing an explanation of why she would not be able to get credit in substantially the amount or on substantially the terms requested.

Ms. Taylor now requests that the Court grant summary judgment in her favor because after Vintage had determined that it would be unable to obtain financing for her on the terms that

were contained in the complete application (a fixed rate loan, fully amortized over 360 months with a 95% loan to value for the amount she requested), it failed to provide Ms. Taylor with an adverse action notice within thirty (30) days of the decision, choosing instead to provide the information, including the reasons for the rejection, verbally to Nelson, a third party, and in violation of ECOA. Without addressing Nelson's alleged third party status in the transaction with Vintage, Ms. Taylor states that Vintage is liable under ECOA for failing to provide her with notice.[4]

Vintage is a creditor within the meaning of ECOA because it participated in the decision of whether or not to extend credit to Ms. Taylor. Furthermore, as a remedial consumer protection statute, ECOA is to be construed liberally in favor of the consumer. See Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384, 390 (3d Cir. 2002) (citing Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir.1998)). In the instant case, Ms. Taylor avers that Vintage's failure to comply with ECOA unjustly prevented her from obtaining the credit terms to which she was rightfully entitled, and denied her the opportunity to explain or rectify the problems in her application for credit.[5]

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[4]Section of 1691(d) of the ECOA states that "[w]ithin thirty days . . . after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application." 15 U.S.C. § 1691(d)(1). The accompanying Regulation B, issued by the Board of Governors of the Federal Reserve System pursuant to ECOA, is found at 12 C.F.R., Part 202.

Regulation B provides that "[a] creditor shall notify an applicant of action taken within: (i) 30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application." 12 C.F.R. § 202.9(a)(1)(i). A creditor must provide the applicant written notification if "adverse action" is taken. 15 U.S.C. § 1691(d)(2).

Regulation B defines "adverse action" as "(i) [a] refusal to grant credit in substantially the amount or on substantially the terms requested in an application *unless* the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered." 12 C.F.R. § 202.2(c)(i) (emphasis added).

[5]Ms. Taylor states that if she "would have known the reasons for the rejection of her credit application she would have addressed the reasons, even if it meant, delaying or forgoing the purchase of Gerritt Street and buying a less expensive house." (Pl.'s Statement of Facts in Support of Mot. for Partial Summ. J. Against Def. Vintage ¶32.)

In response, Vintage argues that because Nelson, a third party, was the contact person for Ms. Taylor and was acting with apparent authority on her behalf at all times (Ms. Taylor provided Nelson with all the necessary documentation to complete processing of her application), Vintage acted at the direction of Nelson and tried to procure finance for Ms. Taylor based on Nelson's representations. Vintage argues that it complied with ECOA notice requirements because any and all developments with respect to the procurement of Ms. Taylor's financing were communicated to Nelson on Ms. Taylor's behalf.

Furthermore, Vintage states that its verbal communication with Nelson was sufficient under ECOA because, as a small creditor, it was exempt from the requirement of written ECOA notice. Specifically, ECOA provides an exemption from the written notice of adverse action requirement to small creditors such as Vintage, which did not act upon more than 150 credit applications in the calendar year preceding the year of the alleged violation. To the extent that Vintage provided Nelson with oral notification of adverse action to Ms. Taylor, Vintage satisfied its obligation under ECOA.

In short, Ms. Taylor's entitlement to summary judgment on her ECOA claim against Vintage turns upon (1) whether Vintage's communication to Nelson was "notice" within the meaning of 15 U.S.C. § 1691(d), and if so, (2) whether the verbal notice given was sufficient under the law.

Section 1691(d)(1) is clear that "[w]ithin thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application." It is undisputed that Vintage provided a notice of its action on the application, and

Ms. Taylor has not argued here that the form or content of the Vintage notice violated ECOA.[6] But Ms. Taylor states that the information Vintage provided to Nelson rather than to her directly did not "notify the *applicant*" within the meaning of the law.

ECOA provides damages to "applicants" who are harmed as a result of an ECOA violation. An "applicant" is defined as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. § 1691a(b). While it is true that Ms. Taylor was an applicant to be notified for purposes of ECOA, it is also true that Nelson was a third party to the transaction who made a request to Vintage to make a specific extension of credit to the applicant, Ms. Taylor.[7] ECOA makes it clear that

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[6]". . . on May 8, 2001 Vintage, through Mr. Howatt, verbally communicated to Kim Nelson that Ms. Taylor was turned down for the credit requested in the application and the reasons for the turndown. Howatt dep. 93-95, 95, 99." (Pl.'s Statement of Facts in Support of Mot. for Partial Summ. J. Against Def. Vintage ¶29.)

Regulation B provides:

> A notification given to an applicant when adverse action is taken shall be in writing and shall contain a statement of the action taken; the name and address of the creditor; a statement of the provisions of § 701(a) of the Act; the name and address of the federal agency that administers compliance with respect to the creditor; and either:
>
> > (i) A statement of specific reason for the action; or
> > (ii) A disclosure of the applicant's right to a statement of the specific reasons within 30 days, if the statement is requested within 60 days of the creditor's notification. . . .

12 C.F.R. § 202.9(2).

[7]Ms. Taylor has set forth evidence that "Nelson had an interest in the transaction that was adverse to Ms. Taylor and he did not consider himself to be her agent." (Pl.'s Mem. L. in Support of Mot. for Partial Summ. J. Against Def. Vintage 8; Nelson Dep. 141-42, Oct. 20, 2005; Pl's Resp. to Vintage's Statement of Facts ¶ 6.) Vintage disputes this in its response to Ms. Taylor's argument that she is entitled to summary judgment for Vintage's failure to communicate with her directly because Nelson, who provided Vintage with all of Ms. Taylor's personal financial information, including but not limited to pay stubs, and signed documents in fact had apparent authority to act on Ms. Taylor's behalf, so it was reasonable under the circumstances for Vintage to provide notification to Nelson of the actions taken with respect to Ms. Taylor's credit application. (Vintage's Opp. to Pl.'s Mot. Summ. J. 4.) The Court is persuaded that there exists a genuine dispute of fact as to whether Nelson had apparent authority to act on Ms. Taylor's behalf in the Vintage transaction. But Nelson's agency is not material under the governing statute. While it is true that ECOA is to be construed liberally in favor or consumers and against creditors, Ms. Taylor has presented no authority (and this Court finds none) to read new provisions into the law. ECOA neither mentions nor contemplates a need to resolve an issue of apparent agency in determining whether a creditor has complied with the statute's notice provisions; therefore, Nelson's apparent authority is immaterial as to

> [w]here a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, *or indirectly through the third party*, provided in either case that the identity of the creditor is disclosed.

15 U.S.C. § 1691(d)(4); see also 12 C.F.R. § 202.9(g) (emphasis added).

The undisputed evidence of record offered by both Ms. Taylor and Vintage supports this Court's finding that Nelson, a third party, requested that Vintage make a specific extension of credit directly to the applicant, Ms. Taylor. Vintage satisfied its ECOA notice obligation by providing the notification and statement of reasons required by the subsection to Ms. Taylor indirectly through Nelson, the third party. Ms. Taylor has not offered any evidence that she made any direct inquiry to Vintage or its representatives to which Vintage was required but failed to respond directly. She has not offered any evidence that Vintage failed to notify Nelson, the third party who made the specific request for the extension of credit to her, nor has she offered evidence that Vintage failed to disclose its identity in the notice and statement of reasons. In short, Vintage's communication to Nelson was "notice" within the meaning of 15 U.S.C. § 1691(d).

Furthermore, the verbal notice given was sufficient under the law. ECOA states that the notice requirement "may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken." 15 U.S.C. § 1691(d)(5), see also 12 C.F.R. § 202.9(d). Ms. Taylor states that in 2001 Vintage originated and recorded not less than twenty-three (23) mortgages in its own name in the City of Philadelphia; and

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whether Vintage complied with ECOA's notice provisions, and cannot form the basis of a grant or denial of summary judgment as to this element of Ms. Taylor's cause of action.

between April 1, 2001 and June 13, 2002, Vintage originated and recorded not less than thirty-two (32) mortgages in its own name in the City of Philadelphia. (Pl.'s Statement of Facts in Support of Mot. for Partial Summ. J. Against Def. Vintage ¶¶ 9-10.) Consistent with Ms. Taylor's assertion, Vintage's states that "[a]t the time of Ms. Taylor's transaction, Vintage was only in the very beginning phases of offering full scale lending to a potential applicant" and in 2000, the company "funded only a small number of loans which was well below the 150 contemplated by ECOA." (Vintage's Opp. to Pl.'s Mot. Summ. J. 3.)

Vintage took its action on Ms. Taylor's application in May 2001. Viewing the record in the light most favorable to Ms. Taylor, it is reasonable to infer that Vintage acted on more applications in 2001 than it acted on in 2000 (the year preceding the calendar year in which the adverse action was taken), but the evidence does not prove or support an inference that Vintage acted on more than 150 applications in 2000. Vintage as a small creditor acting upon fewer than 150 applications in 2000 satisfied its ECOA notice requirements by providing verbal statements of reasons to Nelson.

Because Vintage's communication to Nelson was "notice" within the meaning of 15 U.S.C. § 1691(d)(4), and the verbal notice given was sufficient under 15 U.S.C. § 1691(d)(5), Ms. Taylor's motion against Vintage is denied.

B. Ms. Taylor's Motion for Partial Summary Judgment Against Meritage

Ms. Taylor first requests that summary judgment be granted in her favor on the grounds that Meritage violated ECOA's notice provision by failing to provide her with an ECOA notice of counteroffer–informing her that her application for credit had been denied for the terms that

she requested, but offering to extend to her credit on other, different terms–and secondly because that violation, per se, is a violation of the UTPCPL.

According to Ms. Taylor, Mr. Howatt of Vintage applied on her behalf for a 30-year fixed rate mortgage loan from Meritage in the amount of $40,000 at 10.75% interest, fully-amortized over thirty years. She subsequently received credit on different terms, which she ultimately accepted when she closed on the house. Meritage is a creditor within the meaning of ECOA and therefore subject to the statute's requirements, a fact that Meritage itself does not dispute. (See Resp. of Meritage in Opp. to Pl.'s Mot. Partial Summ. J. 6.) Meritage also does not dispute Ms. Taylor's assertion that Vintage generated and submitted to Meritage a Universal Residential Loan Application ("URLA") for credit, reflecting the terms of the credit Ms. Taylor was requesting. (Id. 7-8; Pl.'s Mot. Summ. J. Against Meritage 12.) Finally, it is undisputed that on June 12, 2001, Meritage did not originate any fixed-rate, first mortgage loans in Pennsylvania for less than $50,000.00. (Pl.'s Mot. Summ. J. Against Meritage 13; Resp. of Meritage in Opp. to Pl.'s Mot. Partial Summ. J. 9.)

What is disputed is whether Meritage failed to satisfy an obligation under ECOA to notify Ms. Taylor that it did not offer fixed-rate, first mortgage loans in Pennsylvania for less than $50,000.00 in the same manner that it would have been obligated to notify her if it did offer that type of loan, but had chosen not to extend her credit on the terms she requested. Meritage states that Mr. Howatt did not and could not have applied for a 30-year fixed rate mortgage loan from Meritage because he had prior knowledge that Meritage did not offer a fixed rate mortgage program. (Resp. of Meritage in Opp. to Pl.'s Mot. Partial Summ. J. 9 and Exh. "1", ¶¶ 5,6.) Furthermore, even if Mr. Howatt's communication to Meritage could be deemed to be an actual application as Ms. Taylor alleges, Meritage, as a matter of law, did not take "adverse action"

against Ms. Taylor by not considering an "application" for such financing because Ms. Taylor used and accepted Meritage's counteroffer of credit when she closed on the house.

Moving forward, Ms. Taylor seeks a grant of summary judgment in her favor as to her UTPCPL claim against Meritage, arguing that because courts have often construed the violation of various consumer protection statutes as per se violations of the UTPCPL, this Court should find that Meritage's violation of ECOA amounts to a violation of the UTPCPL, as a matter of law. In response, Meritge asserts that because Ms. Taylor's motion must fail as to the alleged ECOA violation, her motion must also fail as to her alleged UTPCPL violation that is based entirely upon the ECOA claim.

Beginning with the alleged ECOA notice violation, Ms. Taylor asserts that she did in fact submit a complete, written application to Meritage through Vintage. Meritage argues that Ms. Taylor cannot substantiate a claim that she submitted, through Vintage, a written request for the extension of credit in the form of a 30-year, fixed rate mortgage. Viewing the evidence of record in the light most favorable to the non-moving party, Meritage, this Court cannot summarily conclude that Ms. Taylor's URLA and loan package formed a written application for credit for purposes of establishing an ECOA violation.

Assuming, nonetheless, for the purposes of the motion that Ms. Taylor did submit a written application to Meritage, the motion must fail as a matter of law. As stated above, the parties do not dispute the fact that Meritage did not offer fixed rate first mortgage loans under $50,000 in Pennsylvania at the time that Ms. Taylor requested mortgage financing. Ms. Taylor requested a certain type of credit on a certain set of terms. Regulation B specifically excludes the refusal to extend credit because the creditor does not offer the type of credit or credit plan requested from the definition of adverse action. See 12 C.F.R. § 202.2(c)(2)(v).

Notwithstanding the fact that Meritage did not take adverse action that would trigger the notice provisions of ECOA, Ms. Taylor requests in the instant motion that the Court read ECOA to mean that "Regulation B does not . . . exempt creditors from providing a *notice of counteroffer* to the applicant where the applicant uses or expressly accepts credit offered on substantially different terms . . . ." (Pl.'s Mot. Summ. J. Against Meritage 14.) Simply stated, Ms. Taylor's insistence that Meritage was obligated to provide her with an ECOA notice of a counteroffer of credit on different terms that she accepted and ultimately used has no basis in the facts of record or, more importantly, in the law.

The law is clear that a counteroffer made by a creditor and accepted by an applicant is not an adverse action requiring additional notice under the ECOA.[8] There is also no requirement that notice of a counteroffer must be provided within thirty days after receipt of a completed application and prior to the closing of a loan. According to the allegations of the Complaint, Meritage made a counteroffer for the extension of credit, which Joan Taylor clearly accepted by executing the loan documents, honoring the terms, and accepting the proceeds of the loan. Therefore, Ms. Taylor's request for summary judgment on her ECOA claim is improper.

The entire basis of Ms. Taylor's request for summary judgment on her UTPCPL claim is the ECOA violation she has alleged against Meritage. (Pl.'s Mot. Summ. J. Against Meritage 23.) As her request for summary judgment fails on the ECOA claim, Ms. Taylor's request for summary judgment as to her UTPCPL claim must be denied.

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[8]Regulation B provides that "[a] creditor shall notify an applicant of action taken within: (i) 30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application." 12 C.F.R. § 202.9(a)(1)(i). A creditor must provide the applicant written notification if "adverse action" is taken. 15 U.S.C. § 1691(d)(2).

Regulation B defines "adverse action", in pertinent part as "(i) [a] refusal to grant credit in substantially the amount or on substantially the terms requested in an application *unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered*." 12 C.F.R. § 202.2(c)(i) (emphasis added).

C. Defendant Vintage's Motion for Summary Judgment

In her Complaint, Ms. Taylor alleges that Vintage participated in her purchase of credit fraudulently and in violation of the UTPCPL, violated ECOA by acting as an agent for Meritage and as an arranger of credit, and violated RESPA by accepting compensation from Meritage in the course of the loan transaction. According to Vintage, the Plaintiff is unable to state a cause of action for common law fraud, under UTPCPL, ECOA, or RESPA. For the reasons set forth below, the Court agrees and will grant complete summary judgment in favor of Vintage.

1. Common Law Fraud

Ms. Taylor alleges that Vintage defrauded her by securing a fraudulent appraisal of the property performed by Blum. (Compl. ¶¶ 72, 155.) To prove fraud in Pennsylvania, a plaintiff must prove six elements: (1) a misrepresentation, (2) material to the transaction, (3) made falsely, (4) with the intent of misleading another to rely on it, (5) justifiable reliance resulted, and (6) injury was proximately caused by the reliance. See Santana Prods., Inc. v. Bobrick Washrom Equip., Inc. , 401 F.3d 123, 136 (3d Cir. 2005) (applying Pennsylvania common law); see also Thibodeau v. Comcast Corp., No. 04-177, 2004 U.S. Dist. LEXIS 20999, *20 (E.D. Pa. Oct. 21, 2004) (citing Giannone v. Ayne Inst., 290 F. Supp. 2d 553, 566-67 (E.D. Pa. 2003)). Each element must be proven by clear and convincing evidence. Wittekamp v. Gulf & Western, Inc., 991 F.2d 1127, 1142 (3d Cir.1993), cert denied, 510 U.S. 927 (1993). Furthermore, FED. R. CIV. P. 9(b) requires that an allegation of fraud be pled with specificity.

Vintage asserts that Ms. Taylor has nothing more than unsubstantiated beliefs that Vintage, acting as an agent for Nelson and Meritage, secured a fraudulent appraisal from Blum, and has proffered no factual basis to support this assertion. Vintage states that it did no more than broker the transaction by which the appraisal was subsequently secured (Vintage's Mot.

Summ. J. 8), and evidence to the contrary is absent from the record. Instead, the record, even viewed in the light most favorable to Ms. Taylor, reveals that it was Nelson, not Vintage, who in fact secured the appraisal from Blum.[9] Without evidence that Vintage made a misrepresentation to Ms. Taylor regarding the Blum appraisal, Ms. Taylor cannot sustain a claim for fraud under Pennsylvania law. Ms. Taylor has failed to plead with specificity or set forth any evidence to support her allegation that Vintage secured Blum's appraisal in the first place, much less that Vintage secured the appraisal fraudulently in violation of Pennsylvania common law.

2. Pennsylvania Unfair Trade Practices and Consumer Protection Law

Next, Vintage argues that Ms. Taylor cannot state a claim for a violation of UTPCPL because the statute limits the private right of action to persons who purchase or lease goods or services. Since Ms. Taylor did not actually purchase goods or services from the Vintage, she lacks standing to bring an action against Vintage with respect to the loan transaction at issue in this case under the UTPCPL. Furthermore, Vintage asserts that it is legally insufficient that Ms. Taylor may have been prevented from purchasing goods or services because of allegedly deceptive trade practices because she did not complete a purchasing transaction with Vintage. Alternatively, Vintage argues for dismissal of Ms. Taylor's UTPCPL claim on the basis that she

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[9] Q: Did Vintage authorize you to engage Mr. Blum?
A: Vintage authorizes me to do nothing. Everybody is an independent contractor. You–you go with who you get along with. Okay. I mean, it's not like somebody is going to push the envelope to go to the next level for you, or put their career on jeopardy, sir, with saying something that's not–doing something that's not the process of something that's not all the way accurate. It's not like that. . . .
Q: But the invoice for this went to Vintage?
A: It doesn't matter. That's probably because they were going to put it ideally on the HUD-1 sheet. I believe I paid that money out of pocket POC, paid out of closing. It should be on the HUD-1 sheet. It's really easy. . . .

(Nelson Dep. 173:18-174:7, 175:2-9, Oct. 20, 2005.) Ms. Taylor has not offered any proof to rebut Nelson's deposition testimony, or otherwise establish a genuine issue of material fact for a fact finder to decide.

has failed to establish that Vintage committed common law fraud as required under the UTPCPL and FED. R. CIV. P. 9(b) .

Although Ms. Taylor has not specifically responded to Vintage's Motion, she has argued throughout the litigation thatshe has standing under the UTPCPL and otherwise to recover the damages which she suffered because she was the intended victim of Defendants' fraudulent and deceptive practices. Ms. Taylor alleges that Vintage engaged in unfair and deceptive conduct, by securing a fraudulent appraisal from Blum which resulted in Ms. Taylor incurring a liability of $35,000.00, plus $2,500.00 that she paid to Nelson. (Compl. ¶ 153.) In other words, Ms. Taylor alleges that the purchase by Vintage of an appraisal from Mr. Blum that caused the harm of Ms. Taylor's subsequent housing debacle violated the UTPCPL.

The purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices, but a private right of action is expressly and unambiguously limited to persons who purchase or lease goods or services. The statute protects only those who obtain goods or services in exchange for money or its equivalent, not those who may receive a benefit from, or be indirectly injured by, the purchase. See Baldston v. Medtronic Sofamor Danek, Inc., 152 F. Supp. 2d 772 (E.D. Pa. 2001), affirmed by 285 F.3d 238 (3d Cir. Pa. 2002); see also Gemini Physical Therapy & Rehab., Inc. v. State Farm Mutual Auto Ins., Co., 40 F.3d 63 (3d Cir. 1994); Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc., 574 A.2d 641(Pa. Super. Ct. 1990). It is clear that Ms. Taylor entered into an agreement with Vintage "to obtain a mortgage loan commitment." (See Pl.'s Mot. for Partial Summ. J. Against Meritage, Exh. "D", entitled "Uniform Residential Loan Application" 40.) But because she has neither alleged nor proffered evidence that she purchased or leased the allegedly fraudulent

Blum appraisal from Vintage, Ms. Taylor lacks standing to bring an action against Vintage under the UTPCPL and her claim must be dismissed.

3. ECOA Violations

Vintage next asks the Court to grant summary judgment in its favor on Ms. Taylor's ECOA claim on the grounds that Ms. Taylor cannot state a claim under ECOA because (1) she never directly applied to Vintage for credit, and (2) Vintage did not extend to her the right to incur debt and defer payments for the purchase of her property. Accordingly, Vintage suggests that it cannot be implicated under the statute because Vintage did not act as a "creditor" and did not extend "credit" to Ms. Taylor within the meaning of the statute.

While the Court is not persuaded by Vintage's reading of ECOA or its application to the evidence and facts of record, for the reasons set forth above in consideration of Ms. Taylor's Motion against Vintage, summary judgment must be granted in favor of Vintage on the ECOA claim.[10] Vintage is a creditor within the meaning of ECOA because it participated in the decision of whether or not to extend credit to Ms. Taylor. But as explained above, Ms. Taylor's averment, that Vintage's failure to comply with ECOA unjustly prevented her from obtaining the credit terms to which she was rightfully entitled and denied her the opportunity to explain or rectify the problems in her application for credit, is unsupported by the record because Vintage's third-party applicant communication to Nelson was "notice" within the meaning of 15 U.S.C. § 1691(d)(4), and the verbal notice given was sufficient under 15 U.S.C. § 1691(d)(5).

[10]ECOA prohibits creditors from discriminating against applicants on the basis of race, color, religion, national origin, sex or martial status, or age; and requires notice of adverse action as described above. 15 U.S.C. 1691(a). However, the record reflects that Ms. Taylor has not offered any evidence of an ECOA discrimination cause of action against Vintage or any other defendant in this litigation.

4. RESPA Violations

Finally, Ms. Taylor's RESPA claim must fail because the evidence of record reflects that Vintage was only paid for services that it actually rendered: a $500.00 brokerage fee which is clearly listed on the Final Settlement Statement. (See Dailey Dep. 162:4-163:11, Aug. 31, 2005; Howatt Dep. 174:1-175:10, 295:1-13; Oct. 19, 2005; and Meritage Mot. Summ. J., Exh. "S", Meritage 298, line 807.) RESPA's prohibition against kickbacks and unearned fees states in pertinent part:

> (a) Business referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) Splitting charges. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.
>
> (c) Fees, salaries, compensation, or other payments. *Nothing in this section shall be construed as prohibiting (1) the payment of a fee* (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or *(C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed,* or (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers . . . .

12 U.S.C. § 2607 (emphasis added).

Ms. Taylor claims that Vintage received payments in violation of RESPA, but the record does not reflect any evidence to support this allegation or rebut Vintage's contention–and the evidence in support of that contention–that it was only paid for services that it actually rendered.

As RESPA does not prohibit the payment of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, the Court will dismiss Ms. Taylor's RESPA claim against Vintage.

D. Meritage Defendant's Motion for Summary Judgment

Meritage's position in this case is that to the extent Ms. Taylor has suffered any loss, it is a result of Nelson's non-performance and the failure of AHC to provide any counseling or oversight after placing Plaintiff in the hands of Nelson. Specifically, Meritage states that for its part, it prepared and mailed its loan disclosures to Ms. Taylor pursuant to its policies and procedures (with copies of each document packet retained in Meritage's own file), even though Ms. Taylor does not recall receiving the Meritage disclosures and Meritage does not have record of receiving the disclosures Plaintiff was requested to sign and return. Further, Meritage moves that it had no knowledge that it was Nelson who altered various documents as he thought necessary throughout the entire process. Meritage has requested that the Court grant summary judgment in its favor on Counts I, II, and III in their entirety, Count IV for ECOA notice violations, Counts V, VI, and VII in their entirety, and Count VIII for RESPA violations.[11]

1. UTPCPL Rescission

The first count of the Ms. Taylor's Complaint is a demand for rescission under the UTPCPL that must be dismissed. Although the UTPCPL provides for the rescission of certain contracts, the rescissions provision does not apply to the Meritage loans at issue here as the right to rescission under UTPCPL only applies "where goods or services having a sale price of twenty-five dollars ($25) or more are sold or contracted to be sold to a buyer, as a result of, or in

[11]Meritage indicates in the motion that Ms. Taylor has agreed to dismiss the claims she asserts in Count IV for ECOA discrimination violations and Count VIII for FDCPA violations. As such, the Court will refrain from making a determination on these claims and the claims shall remain for stipulation by the parties.

connection with, a contact with or call on the buyer or resident at his residence either in person or by telephone." 73 PA. STAT. § 201-7(a). Ms. Taylor has never alleged, nor proffered evidence anywhere in this record that there was such contact here between Meritage and her, or that this Court should extend the scope of the UTPCPL rescission requirements in the context of her mortgage loans where the lender did not contact her directly. Without any factual or evidentiary support, Ms. Taylor's claim fails as a matter of law.

2. UTPCPL Damages

Meritage argues that Count II for UTPCPL damages should also be dismissed because Ms. Taylor cannot offer any facts that would substantiate a claim that Meritage acted fraudulently or deceptively in its dealings with her.

Although Ms. Taylor has not specified which provisions of the UTPCPL apply to her claim against Meritage, the record viewed in the light most favorable to non-movant, Ms. Taylor, supports construing and limiting her allegations that Meritage induced her into purchasing a property that was other than what it was represented to be, and engaged in deceptive conduct which created a likelihood of confusion or misunderstanding as violations of subsections (v), (vii), and (xxi) of the UTPCPL. 73 PA. STAT. § 201-2(4).

Subsection (v) prohibits "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have." Id. Subsection (vii) prohibits "representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another." Subsection (xxi) prohibits engaging "in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." Id.

Any deceptive conduct that is misleading or creates a likelihood of confusion or of misunderstanding violates the UTPCPL, and proof of deceptive conduct is distinct from proof of fraud. While the Supreme Court of Pennsylvania has considered that a plaintiff bringing an action under the UTPCPL must prove the common law fraud elements of reliance and causation, the Third Circuit has explained that an action in Pennsylvania for deceptive trade practices–unlike an action for fraud–does not require proof of scienter or actual reliance. See Santana, 401 F.3d at 136-37; Island Insteel, Inc., 296 F.3d at 204. Thus, Ms. Taylor does not have to establish fraud to establish a claim under the UTPCPL.

Meritage argues correctly that summary judgment is appropriate on Ms. Taylor's UTPCPL claim if she cannot establish at a legal minimum that Meritage made a false representation, that it did so knowingly or recklessly, that it intended for her to rely on the misrepresentation, and she did so to her detriment. While Ms. Taylor bears the burden of proving causation, the parties in this case all agree that Ms. Taylor was harmed in the course of events giving rise to this litigation. More importantly, the Court has found the scintilla of evidence required to preserve Ms. Taylor's claim that Meritage misrepresented the true value of the property in violation of UTPCPL.

By its express terms, the UTPCPL requires a representation, whether it is to establish fraud or it is to establish deception. Meritage received an appraisal report prepared by Mr. Blum and used the appraised value of the property contained in the report in its underwriting processes when it made loans to Ms. Taylor in the amount of $35,000.00. (See Meritage Mot. Summ. J. 13.) Ms. Taylor states that she "figured that since the bank was willing to lend [her] money to buy the house it was worth at least the amount the bank was willing to lend [her] and that the bank did what it needed to do to figure that out," that "[i]f the bank [was] willing to give [her]

the loan to buy the house that [meant] they would have sent someone to the neighborhood and decided it was a neighborhood they were willing to lend money in," and that "[w]hen Mr. Kim Nelson told [her she] was approved for the loan, [she] thought that meant the house was worth at least what [she] was paying for it." (Aff. Joan Taylor ¶¶ 1-3.)

While the record is replete with assertions and allegations of misconduct on the part of Meritage, which Ms. Taylor says gave rise to her inference and/or assumption of Meritage's role in valuing the property, Meritage disputes this and asserts that the record is void of any evidence that it made any representations at all to Ms. Taylor. However, Meritage's role as the lender for the purchase of the property and Ms. Taylor's sworn statement that she relied on Meritage's representation of the value of the property when she made her decision to complete the purchase transaction presents a triable question of fact as to whether Meritage misrepresented the value of the property, and deceptively conducted the loan transaction and closing in a reckless manner by failing to obtain a proper payoff figure. As such, summary judgment on Ms. Taylor's claims under the UTPCPL is premature.

3. Common Law Fraud

Meritage argues that Count III for common law fraud should be dismissed because there is no evidence that Meritage made any representation to Ms. Taylor with the intention of inducing her to act, that Ms. Taylor justifiably relied on such misrepresentation, or that Ms. Taylor sustained any damages as a proximate result. Ms. Taylor alleges that Meritage defrauded her by inducing her "to incur financing for the property that was other than what it was represented to be." (Compl. ¶ 145.)

As explained above, proof of fraud in Pennsylvania requires: (1) a misrepresentation, (2) material to the transaction, (3) made falsely, (4) with the intent of misleading another to rely on

it, (5) justifiable reliance resulted, and (6) injury was proximately caused by the reliance. See Santana, 401 F.3d at 136-37; Island Insteel, Inc., 296 F.3d at 204. Each element must be proven by clear and convincing evidence. Wittekamp, 991 F.2d at 1142.

Ms. Taylor has proffered evidence to allow a reasonable juror to determine that Meritage materially misrepresented the true value of the property, but has failed to establish that Meritage made statements falsely with the intent of misleading Ms. Taylor to rely on them. While it stands to reason that Meritage may have done a very poor job of executing the mortgage and closing by approving a mortgage loan that Ms. Taylor alleges Meritage knew or should have known exceeded the true value of the property, that the payoff figure did not accurately reflect the value of the property does not constitute fraud, particularly given that it was Vintage, through Nelson and Blum, who brought the payoff figure to Meritage. Fraud must be shown by clear and convincing evidence, neither of which exist in this case. Therefore, this Court will grant summary judgment in favor of Meritage on Ms. Taylor's claim of fraud.

4. ECOA Notice Violations

As discussed above in Ms. Taylor's Motion against Meritage, Count IV for ECOA Notice violations must fail because Meritage did not offer the type of loan for which Ms. Taylor says she applied and was counteroffered. ECOA provides an exception to the notice of adverse action requirement where a creditor does not offer the type of credit or credit plan the borrower requests. Furthermore, Meritage was not required to provide formal written notice because Meritage did make a counteroffer that Ms. Taylor accepted. Summary judgment is granted in favor of Meritage.[12]

[12]Meritage states in the Motion that Ms. Taylor has agreed to voluntarily dismiss her discrimination claim under ECOA, and that the parties are in th process of formalizing this agreement pursuant to a stipulation.

5. RESPA Violations

Count V for the RESPA violation must fail as a matter of law because RESPA permits fees that are paid for facilities actually furnished or services actually performed in the making of a loan. As discussed above in consideration of Vintage's Motion, Meritage did pay Vintage a 2% yield spread on the $25,000 loan, or a total fee of $500.[13] But the fee was disclosed as required on the HUD-1 for the $25,000 loan, and Vintage did in fact provide compensable goods and services with regard to Plaintiff's mortgage financing. These actions are consistent with the "type of goods and services performed for the compensation paid" as contemplated under the statute and therefore do not violate RESPA as a matter of law.

Ms. Taylor alleges in Count VIII that Meritage violated RESPA when it "ignored [Ms. Taylor's] recission [sic] [of the loan transactions] and continued to attempt to correct the debt." (Compl. ¶ 180.) Non-compliance with RESPA[14] can result in liability for the servicer of the loan to the "borrower" of the loan. For there to be a RESPA claim for rescission, there must be a

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[13]Ms. Taylor alleges at paragraph 168 of her Complaint that Meritage paid Nelson a $2,500 broker fee, commission, kickback or thing of value, but offers no evidence to substantiate her claim that any such payment was made, much less that it was made in violation of RESPA.

[14]RESPA requires that

> [i]f any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days . . . unless the action requested is taken within such period. . . .

and further provides that

> . . . [A] qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that –
>
> . . . .
>
> (i) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605(e)(1).

"qualified written request," and more specifically, there must be an item of "written correspondence."[15] The record reveals that Ms. Taylor only sent an item of written correspondence to Meritage on January 30, 2002 when her attorney sent a letter enclosing a payment and requesting that Resources Bancshares Mortgage Group (RBMG) rescind Ms. Taylor's loan "pursuant to Regulation Z," but it did not request information relating to the servicing of the loan. (See Meritage Mot. Summ. J., Exh. "Y".) Thus the letter was not a qualified written request for information such that Meritage's failure to respond would violate RESPA. Meritage cannot be found liable for failing to respond or act upon something that was never sent. The evidence offered by Ms. Taylor with regard to letters sent to Meritage is not sufficient to present a genuine issue of material fact and her claim must be dismissed.

6. HOEPA Violations

Count VI for violations of HOEPA must be dismissed because the claim is based on the allegation the since the Meritage loans were "high rate mortgages" within the meaning of the statute, the loan transactions were subject to additional disclosure requirements that were to be provided three days before consummation of the transaction. (Compl. ¶ 171.) However, the Court is persuaded that Ms. Taylor has not and cannot demonstrate that the Meritage loans were "high rate mortgages" within the meaning of the statute because, according to Meritage, the loans were not.

HOEPA states unambiguously that "[a] mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction, a reverse mortgage transaction, or a transaction under an open end credit plan," 15 U.S.C. § 1602(aa)(1), where "[t]he term 'residential mortgage transaction'

[15] Id.

means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w).

The record reveals that Ms. Taylor used the two loans–for $25,000.00 and $10,000.00–that Meritage funded to purchase the property for its contract sales price of $35,000.00, the aggregate amount of the loans. (Meritage Mot. Summ. J. 37.) Because the purchase was a residential mortgage transaction, specifically excluded from HOEPA, and Meritage cannot be found to have violated a statute that does not apply to the transaction at issue under any set of facts, the Court will grant summary judgment in favor of Meritage on Ms. Taylor's HOEPA claim.

7. TILA Violations

Ms. Taylor states that Meritage violated TILA because the disclosures she was provided in connection with the Meritage loan transaction contained material violation that gave rise to Ms. Taylor's right to rescind, and because Meritage failed to give her notice of her right to rescind the loan transactions. (Compl. ¶¶ 175-76.) The Court finds, however, that Count VII for TILA rescission must be dismissed because TILA, like HOEPA, specifically excludes residential mortgage transactions such as the one that is the subject of this suit.

The relevant portion of TILA, which sets forth the right of rescission as to certain transactions states:

> (a) Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or

> acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title [15 USCS §§ 1601 et seq.], whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

15 U.S.C. § 1635(a), also clearly exempts residential mortgage transactions such as the one in which Ms. Taylor and Meritage participated. Specifically, §1635(e) exempts "a residential mortgage transaction as defined in 15 U.S.C. § 1602(w)" from the requirements of TILA. As indicated above Meritage cannot, as a matter of law, be found to have violated the TILA rescission requirements in this transaction, and the Court will grant summary judgment in its favor.

8. FDCPA Violations

Meritage states that Ms. Taylor has voluntarily agreed to dismiss the claim she has asserted against RBMG under the FDCPA, and that the parties are in the process of preparing an appropriate stipulation.

E. Defendant United One Resources' Motion for Summary Judgment

Although Ms. Taylor never names United One specifically in any of the eight (8) counts alleged in the Complaint, this Court will construe and limit the allegations Ms. Taylor articulates

throughout her Complaint as claims against United One for negligence and common law fraud. Ms. Taylor avers that United One owed and breached a fiduciary duty to her in that the title insurance was taken out in part for her benefit, that United One had a conflict of interest between Ms. Taylor and Nelson, and some or all of the other Defendants that it should have disclosed to Ms. Taylor, and that United One left approximately $60.00 in liens to the City of Philadelphia and $3,000.00 of liens owed to the gas company unpaid at settlement. In response, United One moves the Court for grant of summary judgment because United One believes that Ms. Taylor cannot establish the existent of a duty or breach of duty by United One that would give rise to a sustainable claim of negligence, or prove any act or omission that rises to the level of fraud.

1. Negligence

It is well-settled in Pennsylvania that a cause of action for negligence requires proof of a legal duty owed to the plaintiff, breach of that duty by the defendant, and a causal connection between the defendant's breach and the actual injury or harm suffered by the plaintiff. Pennsylvania does not, absent special or unusual facts, recognize a fiduciary relationship between a title insurance agent and a purchaser or real estate such that "one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Becker v. Chi. Title Ins. Co., No. 03-2292, 2004 U.S. Dist. LEXIS 1988, at *23 (E.D. Pa. Oct. 21, 2004) (quoting Commonwealth, DOT v. E-Z Parks, Inc., 620 A.2d 712, 717 (Pa. Commonw. Ct. 1993). In order to sustain her negligence claim against United One, Ms. Taylor must make a showing of proof that special or unusual facts existed in this case such that United One owed her the fiduciary duty she claims.

In this case, Nelson ordered title insurance and settlement services from United One, which commenced its relationship with on or about May 7, 2001, and failed to provide United One with a complete copy of the agreement for sale at United One's request. (Pl.'s Mem. L. in Opp. to United One Mot. Summ. J. 8). Ms. Taylor did not meet the agent for the title insurance company until the day the settlement took place, she did not ask anyone at the settlement to explain what the documents were that she was signing, neither she nor Nelson said anything at the settlement table in the presence of the United One agent about Nelson's ownership of the property, and Ms. Taylor did not ask the United One agent for assistance or a further explanation of the documents being signed. (United One's Mot. Summ. J. 9.) Ms. Taylor has never alleged that United One failed to timely communicate with Nelson in any way that it should have, nor is there any evidence to suggest that Ms. Taylor herself contacted or attempted unsuccessfully to contact United One at any point prior to the settlement. While Ms. Taylor argues in opposition to United One's request for summary judgment that United One kept her in the dark about the true owner of the property, changes in the amount of the loan and the number of loans, and changes in the sale price, as reflected in the amount of the insurance (Pl.'s Mem. L. in Opp. to United One Mot. Summ. J. 9), Ms. Taylor has failed to offer any viable proof beyond her allegations of any special or unusual circumstances upon which United One should have communicated with Ms. Taylor rather than Nelson who secured the title insurance services and communicated continuously with United One, or that United One was unjustified in providing the copies of title reports and commitments to Nelson.

Rather, Ms. Taylor highlights deficiencies in United One's performance of its alleged contractual duties to Meritage–closing the loan without final approval of the HUD-1, issuing checks disbursing proceeds of the loan without final approval, and failing to produce proof for

Meritage that Ms. Taylor brought a check to the closing table–which might give rise to a claim by Meritage, but do not support Ms. Taylor's own claim against United One. Additionally, Ms. Taylor's claim that United One breached a duty to her as an escrow agent by failing to stop payment when directed to by Ms. Taylor is unsupported, particularly in light of the fact that Ms. Taylor, by her own admission, never entered into any escrow agreement with United One. (Pl.'s Mem. L in Opp. to United One Mot. Summ. J. 18.) Because Ms. Taylor is unable to identify or establish the existence in fact of a specific duty recognized by law between United One and herself, her claim for negligence fails and summary judgment is proper.

2. Common Law Fraud

Ms. Taylor claims fraud against United One on the grounds that United One engaged in specific acts of misrepresentation, non-privileged failures to disclose, and fraudulent concealment in a context permeated with misconduct and conflicts of interest. (Pl.'s Mem. L in Opp. to United One Mot. Summ. J. 21.) United One argues that it has no liability as to the fraud claim because Ms. Taylor alleges overbroadly and non-specifically that United One acted fraudulently as an agent for Meritage and Nelson, but cannot prove that United One owed Ms. Taylor a duty such that there was a conflict of interests that United One failed to disclose to her.

As explained above, proof of fraud in Pennsylvania requires: (1) a misrepresentation, (2) material to the transaction, (3) made falsely, (4) with the intent of misleading another to rely on it, (5) justifiable reliance resulted, and (6) injury was proximately caused by the reliance. See Santana Prods., Inc., 401 F.3d at 136. Each element must be proven by clear and convincing evidence. Wittekamp, 991 F.2d at1142.

Central to Ms. Taylor's assertion that United One conducted the settlement fraudulently is that United One acted with reckless indifference to the truth that Nelson was 'flipping' the property. (Pl.'s Mem. L in Opp. to United One Mot. Summ. J. 22.) While it stands to reason that United One did a very poor job settling on the property and executing the closing, fraud must be proven by clear and convincing evidence. In this case, Ms. Taylor has asserted repeatedly that the Defendants were engaged in or knew about Nelson's "property flipping scheme," but failed to substantiate her claim. Here too, Ms. Taylor's broad assertion that United One acted fraudulently as an agent for Meritage and Nelson in this transaction is unsupported by the record and accordingly must be dismissed.

Finally, the Court will grant United One's request for judgment on Ms. Taylor's claim that at settlement, approximately $3,060.00 in liens held by the City of Philadelphia Dept. of Water Revenue and Philadelphia Gas Works were left unpaid. Although United One has not disputed the existence of these liens, Ms. Taylor has neither alleged nor proved that she was ever asked to pay more money to satisfy this or any pre-existing lien, and therefore sustained no compensable damages as to any liens allegedly left unpaid by the title insurance company.

F. Defendant Richard S. Blum's Motion for Summary Judgment

Ms. Taylor has alleged in this action that Blum violated the UTPCPL and committed fraud by knowingly misrepresenting the condition and value of the property inaccurately and deceptively for the purpose of inducing Ms. Taylor to purchase it. (Compl. ¶¶ 72-75, 77.)

1. UTPCPL Damages

As to the UTPCPL claim, Blum argues in his Motion for Summary Judgment that Ms. Taylor's UTPCPL claim must fail because Ms. Taylor cannot sustain a claim by clear and

convincing evidence that Blum engaged in deceptive or fraudulent conduct in violation of UTPCPL. Ms. Taylor responds by stating that a cause of action under the UTPCPL does not require proof of all the elements of fraud, or clear and convincing evidence. Specifically, Ms. Taylor states that her cause of action under the UTPCPL lies in evidence that the misleading appraisal, provided directly to Meritage and indirectly to Ms. Taylor, "infected" the sale that would not have proceeded to closing absent the appraisal.

Ms. Taylor has not specified which provisions of the UTPCPL are implicated in her claim against Blum. As explained above in the Court's analysis of the Meritage Motion against Ms. Taylor, the record viewed in her most favorable light supports construing and limiting her allegations that Blum acted to induce her into purchasing a property that was other than what it was represented to be and engaged in deceptive conduct which created a likelihood of confusion or misunderstanding as a alleged violation of subsections (v), (vii), and (xxi) of the UTPCPL. 73 PA. STAT. § 201-2(4).[16]

Any deceptive conduct that is misleading or creates a likelihood of confusion or of misunderstanding violates the UTPCPL, and proof of deceptive conduct is distinct from proof of fraud. As described above, an action in Pennsylvania for deceptive trade practices–unlike an action for fraud–does not require proof of scienter or actual reliance. See Santana Prods., Inc., 401 F.3d 123 at 136-37; Island Insteel, Inc., 296 F.3d at 204. Thus, Ms. Taylor does not have to establish fraud to establish a claim under the UTPCPL.

Blum's analysis of the UTPCPL bifurcates the standard to prove liability under the

[16]Subsection (v) prohibits "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have." Id. Subsection (vii) prohibits "representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another." Subsection (xxi) prohibits engaging "in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." Id.

UTPCPL into a showing of deception, or alternatively a showing of fraud. Under the deception prong, Ms. Taylor would have to prove a causal connection to or reliance on an alleged misrepresentation that resulted in harm. According to Blum, Ms. Taylor was fully aware of the condition of the property and characteristics of the neighborhood, she did not request or review Blum's appraisal report until after she closed on the property, and she had never spoken to Blum. Therefore, she could not have relied on any alleged misrepresentations of Blum as to the characteristics of the property, neighborhood, or agreed upon purchase price. Because Blum asserts that his appraisal did not have any bearing on Ms. Taylor's decision to enter into the Agreement of Sale and Purchase of the property, and her decision to proceed to closing was not affected by an appraisal report she did not know existed, she cannot establish that Blum engaged in deceptive conduct in violation of the UTPCPL.

Alternatively, under the fraud prong for UTPCPL liability purposes, Blum asserts that Ms. Taylor must prove that Blum knowingly misrepresented a material fact with the intention of inducing her purchase of the property, and that she sustained damages when she justifiable relied on the misrepresentation. Blum argues in his motion that Ms. Taylor has not offered any evidence at all that she relied on any representation or alleged misrepresentation of Blum's, and her UTPCPL claim, as assessed under the fraud prong, must therefore fail.

The Court has already determined that there exists the mere scintilla of evidence required to preserve Ms. Taylor's claim that she relied on the appraised representation of the value of the property in this litigation, and will apply that determination to the UTPCPL claim against Blum. By its express terms, the UTPCPL requires a representation, whether it is to establish fraud or it is to establish deception. Mr. Blum prepared and then provided Meritage with an appraisal report, and Meritage used the appraised value of the property contained in the report in its

underwriting processes when it made loans to Ms. Taylor in the amount of $35,000.00. (See Meritage Mot. Summ. J. 13.) Reviewing the record, Ms. Taylor states that she "figured that since the bank was willing to lend [her] money to buy the house it was worth at least the amount the bank was willing to lend [her] and that the bank did what it needed to do to figure that out," that "[i]f the bank [was] willing to give [her] the loan to buy the house that[meant] they would have sent someone to the neighborhood and decided it was a neighborhood they were willing to lend money in," and that "[w]hen Mr. Kim Nelson told [her she] was approved for the loan, [she] thought that meant the house was worth at least what [she] was paying for it." (Aff. Joan Taylor ¶¶ 1-3.)

Blum disputes both this representation and reliance, and asserts that the record is void of any evidence that he made any representations at all to Ms. Taylor. However, Blum's role as the appraiser responsible for preparing the appraisal report upon which Meritage relied with it made the loans to Ms. Taylor for the purchase of the property and Ms. Taylor's sworn statement that she relied on the representation of the value of the property when she made her decision to complete the purchase transaction presents a dispute as to whether Blum deceptively conducted the appraisal in a reckless manner by failing to accurately value the property. The Court finds this to be a sufficiently triable question of fact to preserve Ms. Taylor's claim that Blum engaged in deceptive dealings and will deny Blum's motion as to the alleged UTPCPL violation.

2. Fraud

Blum moves in his Motion that the common law fraud claim should fail because Ms. Taylor has no evidence of detrimental reliance upon a false representation, and that there was no way she could have relied upon Blum's purchase appraisal prior to entering into the agreement of sale. Ms. Taylor states to the contrary that the evidence before the Court establishes: (1)

Blum provided an appraisal that was inaccurate, (2) knowingly or with reckless indifference to the truth or willful disregard for its falsity, (3) with knowledge of its use to induce Ms. Taylor to purchase a home, (4) the lender's reliance on the appraisal in providing the loan, and (5) Ms. Taylor's reliance on the lender to conclude the house was worth the amount of the loan.

As explained above, proof of fraud in Pennsylvania requires: (1) a misrepresentation, (2) material to the transaction, (3) made falsely, (4) with the intent of misleading another to rely on it, (5) justifiable reliance resulted, and (6) injury was proximately caused by the reliance. See Santana Prods., Inc., 401 F.3d at 136; see also Thibodeau, 2004 U.S. Dist. LEXIS 20999, at *20. Each element must be proven by clear and convincing evidence. Wittekamp, 991 F.2d at 1142.

In response to Blum's Motion, Ms. Taylor has identified an abundance of evidence throughout the record to allow a reasonable juror to determine that Blum may have misrepresented the true value of the property to Meritage, so an in-depth recitation of that evidence is not warranted here. However, Ms. Taylor has failed to establish that Blum misrepresented the value to her such that she could have relied on the appraisal itself. Ms. Taylor admits that she never spoke with Blum and had no knowledge of the appraisal until after she closed on the property. (Taylor Dep. 182-83, 250-52, Oct. 20, 2005; Pl.'s Resp. Blum's Statement Material Facts ¶¶ 2-7.) Rather than an offer of proof that she relied directly on the Blum appraisal (which she did not), Ms. Taylor has asked the Court to find her "indirect reliance" to be sufficient in this case because "Blum prepared fraudulent appraisals that enabled a 'property flipper,' like Nelson, to sell properties in poor condition, that were cosmetically repaired, to unsophisticated, low-income buyers with poor credit histories at inflated prices." (Pl.'s Mem. L Opp. Mot. Blum Summ. J. 23.)

Relying on the Maryland Court of Appeals case of Hoffman v. Stamper, 867 A.2d 276 (Md. 2005), Ms. Taylor argues that because the court in Hoffman found that plaintiff homebuyers who "knew they had a right to cancel the contracts if the property under-appraised," and "were also deprived of the opportunity to negotiate for a lower price by the phony materials" were harmed by their indirect reliance on fraudulent appraisals, this Court should find that Ms. Taylor similarly relied indirectly on Blum's allegedly fraudulent appraisal. (Pl.'s Mem. L Opp. Mot. Blum Summ. J. 23.)

However, Hoffman involved nine plaintiffs in a case where plaintiffs alleged and proved conspiracy to commit fraud, and there was compelling circumstantial evidence that the defendants were involved in an actual scheme to defraud numerous buyers in purposeful violation of federal law. While Ms. Taylor has offered evidence throughout the litigation to support an inference that the usual business practice of each Defendant involved in the property transaction at the very least enabled the conduct giving rise to this litigation, Ms. Taylor has failed to support her allegations that the Defendants, including Blum, were involved in a scheme tantamount to the conspiracy in Hoffman or otherwise sufficient to persuade this Court to extend the Hoffman court's non-binding, non-precedential interpretation of the elements of fraud to the facts of this case.

While it stands to reason that Blum may have defrauded Meritage, or acted negligently towards Ms. Taylor, the record simply does not support a finding by clear and convincing evidence that Blum defrauded Ms. Taylor. Therefore, this Court will grant summary judgment in favor of Meritage on Ms. Taylor's claim of fraud.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment Against Vintage Mortgage Corporation is denied. Plaintiff's Motion for Partial Summary Judgment Against Meritage Mortgage Corporation is denied.

Defendant Vintage Mortgage Corporation's Motion for Summary Judgment is granted.

Defendant United One Resources's Motion for Summary Judgment is granted.

Meritage Defendants' Motion for Summary Judgment is granted on Count I, Count III, Count IV for ECOA notice violations, Count V, Count VI, Count VII, and Count VIII for RESPA violations. Count II for UTPCPL damages shall remain for trial. Count IV for ECOA discrimination violations, and Count VIII for FDCPA violations shall remain, subject to independent resolution by the parties.

Defendant Richard S. Blum's Motion for Summary Judgment is granted as to Count III of Plaintiff's Complaint for common law fraud. Count II of the Complaint alleging unfair and deceptive practices in violation of the UTPCPL shall remain. All other Counts of the Complaint as to remaining defendants shall remain. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOAN TAYLOR **Plaintiff,**	
	CIVIL ACTION NO. 02-6558
v.	
KIM NELSON ET AL. **Defendants.**	

ORDER

AND NOW, this _____ day of January, 2006, upon consideration of (1) Plaintiff's Motion for Partial Summary Judgment Against Vintage Mortgage Corporation (Doc. 70) and Defendant's Response thereto (Doc. 87); (2) Plaintiff's Motion for Partial Summary Judgment Against Meritage Mortgage Corporation (Doc. 75) and Defendant's Response thereto (Doc. 88); (3) Defendant United One Resources's Motion for Summary Judgment (Doc. 60) and Plaintiff's Response thereto (Docs. 89, 90, 91, 92, 99); (4) Defendant Vintage Mortgage Corporation's Motion for Summary Judgment (Doc. 70) and Plaintiff's Affidavit and Response thereto (Docs. 99, 100); (5) the Motion for Summary Judgment of Defendants Mortgage Electronic Registration System, Resources Bancshares Mortgage Group and Meritage Mortgage Company ("Meritage Defendants") (Doc. 73) and Plaintiff's Affidavit in Response thereto (Doc. 99); and (6) Defendant Richard S. Blum's Motion for Summary Judgment (Doc. 76) and Plaintiff's Response thereto (Docs. 95, 96, 97, 99), **IT IS HEREBY ORDERED AND DECREED** that

1. Plaintiff's Motion for Partial Summary Judgment Against Vintage Mortgage Corporation is **DENIED**;
2. Plaintiff's Motion for Partial Summary Judgment Against Meritage Mortgage Corporation is **DENIED**;
3. Defendant United One Resources's Motion for Summary Judgment is **GRANTED**. **JUDGMENT** is **ENTERED** in favor of Defendant and against

Plaintiff on all counts. The Clerk of the Court shall mark Defendant United One Resources as **TERMINATED**;

4. Defendant Vintage Mortgage Corporation's Motion for Summary Judgment is **GRANTED**. **JUDGMENT** is **ENTERED** in favor of Defendant and against Plaintiff on all counts. The Clerk of the Court shall mark Defendant Vintage Mortgage Corporation as **TERMINATED**;

5. Meritage Defendants' Motion for Summary Judgment is **GRANTED**. **JUDGMENT** is **ENTERED** in favor of Defendants and against Plaintiff on Count I, Count III, Count IV for ECOA Notice violations, Count V, Count VI, Count VII, and Count VIII for RESPA violations. Count II, Count IV for ECOA Discrimination violations, and Count VIII for FDCPA violations shall remain; and

6. Defendant Richard S. Blum's Motion for Summary Judgment is **GRANTED IN PART and DENIED IN PART**. **JUDGMENT** is **ENTERED** in favor of Defendant and against Plaintiff on Count III of Plaintiff's Complaint for common law fraud. Count II of the Complaint alleging unfair and deceptive practices shall remain.

IT IS FURTHER ORDERED the Defendant Wilshire Credit Corporation's Motion for Summary Judgment (Doc. 61) is dismissed as **MOOT**.[17]

BY THE COURT:

/S/ Petrese B. Tucker

Hon. Petrese B. Tucker,

[17]Plaintiff and Defendant Wilshire Credit Corporation have voluntarily stipulated to the dismissal of Plaintiff's claims against Wilshire (Doc. 103).

U.S.D.J.